U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY
identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

BS

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 30 2006

SRC 06 033 50634

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, reopened the matter on her own motion, and denied the petition a second time. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks to employ the beneficiary as a production editor.

The petitioner initially asserted that the beneficiary qualifies for Schedule A, Group II designation, which does not require the submission of an ETA Form 9089, Application for Permanent Employment Certification certified by the Department of Labor (DOL). On November 23, 2005, the director issued a notice of intent to deny, asserting that the ETA Form 9089 submitted was not certified by DOL. In response, counsel reiterated that the petition was filed seeking Schedule A, Group II designation, which does not require a certified labor certification. Counsel also, however, submitted a certified ETA Form 9089. On December 30, 2005, the director denied the petition both on the basis that it was not accompanied by a certified labor certification and based on the petitioner's inability to pay the proffered wage. On March 8, 2006, the director reopened the matter on her own motion acknowledging that the petitioner had submitted a certified ETA Form 9089. The director then reaffirmed the conclusion that the petitioner had not established its ability to pay the proffered wage. The director also raised an alleged inconsistency in the job requirements, concluding that the job does not require an advanced degree professional or an alien of exceptional ability.

On appeal, counsel addresses the director's bases of denial. While we withdraw the director's conclusion regarding inconsistent job requirements, we concur with the director that the position does not require an advanced degree professional or alien of exceptional ability and that the record lacks evidence of the petitioner's ability to pay the proffered wage. Moreover, we find that the petitioner has not demonstrated that the beneficiary is an alien of exceptional ability as defined at 8 C.F.R. § 204.5(k)(3)(ii).

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

JOB REQUIREMENTS

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.) We note that on March 28, 2005, the Department of Labor replaced the Form ETA 750 with the ETA Form 9089.

Both the initial uncertified ETA Form 9089 and the subsequent certified ETA Form 9089 reflect that the job requires no degree, no training and one year of experience. Part H, Line 14 lists no additional skills or other requirements. The proffered wage is listed as $22,402 annually. Initially, as required for Schedule A, Group II designation, the petitioner submitted the job notification posted. The job requirement listed on the posted notice is one year of experience.

The director asserted that the certified ETA Form 9089 reflected that one year of training and one year of experience is required but that the job postings submitted in support of the initial request for Schedule A Group II designation only required one year of experience and no training. The director concluded that the petitioner had submitted "conflicting evidence regarding the minimum qualifications for the position" which could not be rectified. Thus, the director determined that the petitioner had not established that the job required an advanced degree professional or an alien of exceptional ability.

On appeal, counsel notes that the posted job requirements and the requirements listed on both the certified and uncertified ETA Forms 9089 are the same. We concur with counsel and withdraw the director's finding of an inconsistency. Counsel further states:

> Under 8 C.F.R. § 204.5(k)(4) exceptional ability is met by showing the job requires an alien of exceptional ability. "Exceptional ability . . . in the arts . . . means a degree of expertise significantly above that ordinarily encountered in the . . . arts." *Id.* Here, an applicant may qualify for the position if they have a minimum of ONE (1) year of experience directing and supervising all Post-Production obligations as described in Form 9089, item 11., entitled job duties. It should be noted that this IS NOT a technical position. This position is Creative and Artistic in nature, and it can ONLY be accomplished by a person with significant expertise in film editing. Beneficiary qualifies based on 5 years of form education and 10+ years of professional experience in the field. Based on the evidence submitted, Beneficiary's expertise is significantly

> above that ordinarily encountered in other film editors; she is an alien of exceptional ability.

(Emphasis and elipses in original.) We will address whether the petitioner herself is exceptional below. At issue in this section is whether the job requirements suggest that the position itself requires an alien of exceptional ability. The requirements for exceptional ability are set forth at 8 C.F.R. § 204.5(k)(3)(ii). Those requirements, which will be discussed in more detail below, include a degree or diploma, 10 years of experience in the occupation, a license to practice the profession or occupation, a salary consistent with exceptional ability, professional memberships and recognition for achievements. An alien must meet at least three of these requirements to qualify as an alien of exceptional ability.

The job requirements for the position do not suggest that the position requires an individual of exceptional ability. They do not include a degree, a license, professional memberships or formal recognition in the field. The petitioner has not demonstrated that the proffered wage, $22,402, is indicative of exceptional ability. The petitioner has also not demonstrated that one year of experience in the position could only be attained after an additional nine years of experience in the broader occupation such that we can conclude the position effectively requires 10 years of experience in the occupation. Thus, we concur with the director's ultimate conclusion that the job requirements are not consistent with a position that requires an individual with exceptional ability as defined in the regulations.

ABILITY TO PAY

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the petition was properly filed in cases involving Schedule A, Group II designation. *See* 8 C.F.R. § 204.5(d). Here, the petition was filed on November 10, 2005. The proffered wage as stated on the ETA Form 9089 is $22,402 annually.

On the petition, the petitioner claimed to have an establishment date in 2001, a gross annual income of $100,000, an undisclosed net income and two employees. Initially, the petitioner submitted no evidence relating to its ability to pay the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 17, 2005, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its 2004 Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Return for an S Corporation. The tax return reflects a net loss and current liabilities that exceed current assets. The priority date, however, is November 10, 2005. In addition, the petitioner submitted paychecks issued to the beneficiary for $740.71 biweekly as of October 1, 2005.

The director determined that the proffered wage amounted to $430.80 weekly but the checks demonstrated payment of only $370.35 weekly. Thus, the director concluded that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 8, 2006, denied the petition.

On appeal, counsel asserts that the petitioner has been paying the proffered wage since the priority date and that the paychecks represent the beneficiary's wages after taxes. The petitioner submits the beneficiary's 2005 Form W-2 reflecting *gross* wages of $3,446.48, the petitioner's quarterly tax return reflecting the same gross wages for the beneficiary during the fourth quarter of 2005 and the petitioner's 2005 tax return reflecting a net loss and current liabilities that exceed current assets. The petitioner also submits the tax returns of its alleged shareholder, [redacted] Counsel relies on a decision by the Board of Alien Labor Certification Appeals (BALCA) for the proposition that the assets of an owner of a business should be considered in examining the business' ability to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The evidence reflects that the beneficiary earned $3,446.48 in *gross* wages for the final quarter of 2005. Thus, in evaluating the petitioner's annual finances, the petitioner must still demonstrate an ability to pay the remaining $18,955.52 of the annual proffered wage. Even if we prorate the proffered wage for the final quarter of 2005, one quarter of the proffered wage is $5,600. Thus, the petitioner paid the beneficiary $2,153.52 less than the proffered wage during the final quarter of 2005. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage during the fourth quarter of 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the

proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. As stated above, the petitioner suffered a net loss in 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's current assets in 2005, $4,357, are exceeded by its current liabilities, $10,469. Thus, the petitioner's net current assets in 2005 were ($6,112).

As stated above, the petitioner paid the beneficiary $2,153.52 less than one quarter of the proffered wage during the final quarter of 2005. The petitioner need only demonstrate an ability to pay the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

wage. The petitioner has not demonstrated that, despite its overall net loss in 2005, it enjoyed a sufficient net income during the last quarter of 2005 to cover the difference between the proffered wage and the wages paid.

Counsel's reliance on the assets of [redacted] is not persuasive. The regulation at 8 C.F.R. § 103.3(c) provides that the Secretary of Homeland Security and the Director of the Executive Office for Immigration Review, with concurrence from the Attorney General, may designate certain decisions as precedent decisions, which are binding on CIS employees in the administration of the Act. Counsel provides no legal authority, however, suggesting that this office is similarly bound by BALCA decisions. Regardless, the BALCA case on which counsel relies involved a sole proprietorship. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities will also be considered as part of the petitioner's ability to pay. While [redacted] appears to be the sole proprietor of another business, the petitioner in this matter is a corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

The petitioner has not demonstrated that it paid the full proffered wage in the final quarter of 2005. In 2005, the petitioner shows a net loss and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2005. As the petitioner also suffered a net loss in 2004 and submits no financial documentation for previous years, the petitioner has not demonstrated that 2005 was an unusually unprofitable year. Thus, we concur with the director that the petitioner has not demonstrated its ability to pay the proffered wage beginning November 10, 2005 and continuing.

EXCEPTIONAL ABILITY

The director did not contest that the petitioner was an alien of exceptional ability. Nevertheless, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims to meet the following criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

On the ETA Form 9089, the beneficiary indicated that she obtained a bachelor's degree in Marketing and Advertising from the Institute of New Professions in 1991. The petitioner submitted a certificate for 100 hours of course work in microcomputers at the Technical Institute Luis Caceres of Arismendi dated December 3, 1991, verification of the beneficiary's completion of the six semester Program in Publicity at the Institute of New Professions dated February 17, 1995, a certificate from the Institute of New Professions conferring the Title of Superior University Technician dated July 14, 1995 and certification from the University of Santa Maria conferring the Title of Specialist dated November 11, 1998. In response to the director's request for additional evidence, the petitioner submitted the beneficiary's transcript from the Institute of New Professions reflecting three years of coursework from 1992 through 1994 and her transcript from the University of Santa Maria "Post Graduate School" reflecting two semesters of courses in 1995 and 1996 amounting to 24 credits total. The petitioner did not submit a foreign credentials evaluation of the above credentials.

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The record does not support the beneficiary's claim to have obtained a bachelor's degree from the Institute of New Professions in 1991. The beneficiary appears to have obtained a three-year degree from that institution in 1995, but the record is absent an evaluation of that degree. Thus, the petitioner has not established that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate degree. In fact, a United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). While the beneficiary subsequently obtained a two-semester degree from the University of Santa Maria, the record similarly lacks an evaluation of this degree. In light of the above, the petitioner has not established that the beneficiary has a foreign degree that is equivalent to a U.S. bachelor's degree.

The record contains a profile of film and video editors from www.acinet.org. The materials reflect that the most common educational/training level for this occupation is a bachelor's degree. More

specifically, over 50 percent of film and video editors have this degree. The petitioner has not established that her technical degrees are significantly above that ordinarily encountered in the field.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner submitted employment letters documenting that the beneficiary has more than ten years of experience in her occupation. Thus, the beneficiary meets this criterion.

A license to practice the profession or certification for a particular profession or occupation

The record contains no evidence relating to this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The record contains no evidence relating to this criterion.

Evidence of membership in professional associations

The record contains no evidence relating to this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner submitted several reference letters, letters of appreciation and evidence of awards won by programs on which the beneficiary worked. We find that this criterion requires evidence of formal recognition outside of the preparation of the petition. Reference letters prepared for the petition, while not without weight, cannot serve as the sole basis of eligibility under this criterion.

The petitioner submitted an August 22, 2005 letter from [redacted] Director of the PROMAX&BDA Awards. [redacted] asserts that the beneficiary was the Promotions Producer and winner for three PROMAX awards in 1998. The petitioner provided Internet materials confirming that the three promotions produced for Televen won gold and silver awards. The spaces for the credits, however, are blank. The only information from Televen is a July 30, 1997 memorandum from [redacted] Chief of Image and Promotions at Televen, thanking the beneficiary for her work as Producer of Promotions on the "King of Herd" campaign. Taken in the aggregate, the evidence establishes that the petitioner won the PROMAX awards documented. Thus, we are satisfied that the petitioner meets this criterion, resulting in a total of two criteria met. As stated above, the alien must meet at least three to be eligible for the classification sought.

In light of the above, the petitioner has not established that the beneficiary is an alien of exceptional ability as defined at 8 C.F.R. § 204.5(k)(3)(ii) as the petitioner has not established that the beneficiary meets at least three of the regulatory criteria.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.